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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 505

IN THE MATTER OF APPORTIONMENT OF THE MICHIGAN LEGISLATURE

MAXWELL F. BADGLEY, et al.,
Appellants,
v.
SECRETARY OF STATE JAMES M. HARE, and AUGUST SCHOLLE, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANTS' BRIEF OPPOSING MOTIONS TO DISMISS OR AFFIRM

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Appellants, pursuant to Rule 16(3) of the Rules of the Supreme Court of the United States, submit this reply in opposition to the Motions to Dismiss or Affirm of appellee James M. Hare and intervenors-appellees August Scholle, et al. These Motions present, in essence, six bases

for the claim that no substantial federal question is presented by this appeal.[1]

(1) The decision of this Court in *Marshall v. Hare*[2] decided the present case, and appellants seek only to re-litigate *Marshall v. Hare.*

(2) The Michigan Supreme Court decided this case solely on a question of state law.

(3) Partisan political gerrymandering does not constitute a denial of equal protection in violation of the Fourteenth Amendment because no case has so held and because of the difficulty of establishing judicial guidelines to deal with gerrymandering.

(4) The proofs offered in support of the gerrymander claims were conclusory and speculative, and were incompetent as a matter of state law; hence such proofs were not sufficient to support a claim of gerrymander and the denial of an opportunity to present such proofs was not a denial of due process.

(5) The facts alleged to support the claim of partisan political gerrymandering were found adversely to appellants.

(6) The Michigan Supreme Court did not apply an absolute population equality requirement to the exclusion of valid Michigan constitutional provisions.

These arguments will be disposed of *seriatim.*

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[1] The Motion of appellee Hare also discusses the validity of certain other apportionment plans which are not in issue here and not relevant to the appeal.

[2] 378 U.S. 561 (1964).

(1) The Significance of Marshall v. Hare.

Intervenors-appellees claim that this case is controlled by *Marshall v. Hare,* 378 U.S. 561 (1964), reversing 227 F. Supp. 989 (E.D. Mich. 1964).[3] The further assertion is made that the original adoption of the Austin-Kleiner plan was consequent upon this Court's decision in *Marshall.* Both assertions are erroneous.

The June 17, 1964, orders of the Michigan Supreme Court, 373 Mich. 247, 128 N.W. 2d 721, declaring the then existent apportionment law invalid and directing the apportionment commission to adopt a new plan in compliance with *Reynolds v. Sims,* 377 U.S. 533 (1964), were issued five days before this Court decided *Marshall.* The Michigan court's subsequent approval of the Austin-Kleiner Plan came on June 22, 1964 without any mention whatever of *Marshall,* coincidentally decided sometime the same day by this Court.[4] (373 Mich. 250, 128 N.W. 2d 722)

This Court's reversal in *Marshall* does not control the present case. At issue in *Marshall* was the constitutional validity of the Michigan constitutional provision commonly known as the "80-20" formula for the senate apportionment and the "0.7 per cent" provision for the house apportionment,[5] both of which resulted in representation based partially on area. This Court's reversal of the District Court concededly invalidated these provisions, but not the remaining anti-gerrymandering standards,[6] the use of which,

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[3] Significantly, the Motion of appellee Hare makes no such claim.

[4] Indeed, the supplemental concurring opinion of Mr. Justice Souris, filed two days later, contains the first mention of *Marshall v. Hare.* (373 Mich. 257, 258, 128 N.W. 2d 724, 725)

[5] Michigan Constitution of 1963, Article IV, Sections 2 and 3.

[6] Cited in footnote on page 30 of appellants' Jurisdictional Statement.

within the population objective, was clearly sanctioned by this Court in *Reynolds v. Sims, supra.*

This proceeding involves an attack upon the present apportionment law, which was not even in effect at the time of *Marshall v. Hare,* on the grounds of political gerrymander and misinterpretation of the Federal equal population requirement, neither decided by *Marshall.*

(2) Jurisdiction of the Appeal is not Precluded by an Adequate Non-Federal Basis for the Judgment.

Appellees assert that the Michigan Supreme Court upheld the present Michigan apportionment law "on state grounds only," and hence this court lacks jurisdiction to review the state court decision. Appellees misconceive the rule they seek to supply.

It has long been settled that this Court will not decline to review a state court's decision that rests upon both a federal and non-federal ground unless the non-federal ground is adequate to support the judgment even if the state court's decision on the federal question be reversed. *Chicago, Burlington & Quincy Railway Co. v. Illinois ex rel. Grimwood,* 200 U.S. 561 (1906), and *Herb v. Pitcairn,* 324 U.S. 117 (1945).

As shown in the Jurisdictional Statement, appellants have consistently claimed that the Michigan apportionment law is invalid because it violates certain rights under the Fourteenth Amendment. The Michigan Supreme Court decided these questions adversely to appellants. There is no state ground to support the Michigan court's decision if this Court reverses the decision below on any of the federal grounds asserted by appellants.

(3) Partisan Political Gerrymandering Violates the Fourteenth Amendment.

Appellees argue that politically gerrymandered legislative districting violates no Federal constitutional right, relying on a statement of Mr. Justice Harlan in his separate concurrence to the *per curiam* affirmance in *WMCA, Inc. v. Lomenzo,* 382 U.S. 4 (1965); *Fortson v. Dorsey,* 379 U.S. 433 (1965); *Burns v. Richardson,* 384 U.S. 73 (1966); and several district court decisions.[7] While Mr. Justice Harlan's statement characterizes the *Lomenzo* order as a holding on the question, appellants respectfully submit that such a result is inconsistent with clear pronouncements of this Court in other cases that received plenary consideration.

The depth of this Court's concern for the achievement of fair and effective representation, including the avoidance of invidiously discriminatory districting, is clear from *Reynolds v. Sims,* 377 U.S. 533, 565-566, 578-581 (1964), and companion cases; also *Fortson v. Dorsey, supra,* and *Burns v. Richardson, supra.* In both *Fortson* and *Burns,* this Court stated clearly and forcefully that the minimization or cancelling out of the voting strength of political elements of the voting population is an invidiously discriminatory and constitutionally offensive result. (See pp. 20-21 of the Jurisdictional Statement.) Those decisions leave no doubt that such discrimination provides the basis for a claim under the Fourteenth Amendment; and the judicial protection should not be different, we submit, because the discrimina-

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[7] *WMCA, Inc. v. Lomenzo,* 238 F. Supp. 916 (S.D. N.Y. 1965); *Bush v. Martin,* 251 F. Supp. 484 (S.D. Tex. 1966); *Kilgarlin v. Martin,* 252 F. Supp. 404 (S.D. Tex. 1966); and *Sims v. Baggett,* 247 F. Supp. 96 (M.D. Ala. 1965).

tory technique alleged in *Fortson* and *Burns* (a combination of single and multi-member districts) is different from that alleged in the present case (gerrymandered single member districts designed for partisan political purposes).

Appellees argue also that judicial review of gerrymandered districting is improper because of the lack of "judicially discoverable and manageable standards" and because the drawing of district boundaries is a complex process inevitably involving political consequences. This argument is untenable in light of the majority opinions in *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims, supra, Fortson v. Dorsey, supra,* and *Burns v. Richardson, supra.* Further, the mechanics of the judicial process in dealing with the political gerrymander are no different from those in dealing with the racial gerrymander involved in *Wright v. Rockefeller,* 211 F. Supp. 460 (S.D. N.Y. 1962), affirmed 376 U.S. 52 (1964).

In short, the Constitution prohibits the use of districting lines designed to minimize or cancel out the voting strength of individual voters, whether by population disparity or on some other basis, and judicial protection against such discriminatory legislative districting may be afforded by standards shown to be fully manageable by courts.

(4) The Refusal to Hear the Offered Proof of Gerrymandering was a Denial of Due Process.

Appellees assert that appellants were not denied due process by the denial of an opportunity to present their offered proofs because the evidence was inadmissible as a matter of state law. Appellants submit that under *Honeywood v. Rockefeller*, 214 F. Supp. 897 (E.D. N.Y. 1963),[8] and *Burns v. Richardson, supra,* proofs such as were offered by appellants are relevant to a determination of the Federal questions presented.

Appellees also attack the sufficiency of appellants' Petition in the court below, and the supporting offer of proof, by reiterating the comments of Justice Souris:

> "As I view the petitioners' complaint and their 'offer of proof', they consist solely of conclusory allegations of suspicion and speculation supported only by reference to election results which, according to them, were achieved by the partisan gerrymandering by the alternate Austin-Kleiner plan. While petitioners assert they could support their claims if permitted to engage in a process of discovery, they have failed to submit an offer of proof of facts within their power to establish as distinguished from facts which they hope to discover." (377 Mich. at 446-447, 140 N.W. 2d at 455).

First, with respect to the sufficiency of the allegations of the Petition (referred to as a complaint by Justice Souris), Michigan General Court Rule 111.9(1) provides that "a pleading shall not state matters of evidence." Those allegations, set forth in part at pages 7-9 of the Jurisdictional Statement, can not be brushed aside as "conclusory."

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[8] Distinguished by appellee Hare from the present case, solely by the claim that this is a non-adversary proceeding. The present case is an original jurisdiction proceeding to review the plan, is the sole method provided to accomplish such review, and has a number of strenuously contesting parties; it is clearly an adversary proceeding.

With respect to the offer of proof, contrary to what Justice Souris and appellees claim, appellants did not condition their offer of proof upon obtaining discovery. The facts that appellants offered to prove, set forth at pages 10-13 and 27 of the Jurisdictional Statement, were part of an unconditional offer of proof. (Appellants offered to prove, in support of their Petition, additional facts not contained in the offer of proof, if allowed discovery.)

Finally, there is nothing speculative about the facts appellants offered to prove. Appellants set forth the nature and identity of witnesses who would testify that the plan was the product of successive re-drafts prepared by reference to past election results for the purpose of disadvantaging voters of one political party.

(5) The Michigan Court Made no Finding on the Facts of the Gerrymander Claim.

Appellees argue that the factual issues with respect to gerrymandering were rejected by the Michigan court's finding that the Austin-Kleiner plan, consistent with the equal population objective, forms districts as compact, contiguous and regular in shape and which follow county, city and township boundaries as nearly as practicable.[9]

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[9] This statement, contained in the June 1964 decision, was obviously not a "finding" rejecting appellants' gerrymander claims, first set forth when the present litigation was commenced some two months thereafter. This "finding," in fact, was rejected by a majority in the November 1965 opinions and by four justices, including Mr. Justice Black (377 Mich. 408, 416-48, 140 N.W. 2d 436, 441), in March 1966. (Opinion of Mr. Justice Dethmers, in which Justices Kelly and O'Hara concurred, 377 Mich. 418-427, 140 N.W. 2d 441-445).

The difficulty with the opinion of "disinterested scholar" McKay to the effect that county lines were crossed only where necessary "to avoid substantial continuing population differentials among the districts," is that he is not "disinterested" and that his conclusion, hardly a "finding," is completely lacking in factual basis.

In truth, the Michigan court allowed no evidence on, and made no findings on the factual issues of, the gerrymander claims. Rather, the court held that as a matter of federal law, a gerrymander constitutes no legal wrong.[10]

(6) Excessive Application of the Federal Population Requirement.

It is appellants' position that the Michigan Supreme Court misinterpreted the Equal Protection Clause equality of population standard under *Reynolds v. Sims,* 377 U.S. 533 (1964), improperly nullifying valid state constitutional apportionment requirements. This is not a simple assertion that the Austin-Kleiner Plan renders equality too equally, but that valid state standards have been disregarded under the guise of enforcing this Court's decisions under the Fourteenth Amendment.

This issue is not obviated, indeed it is created, by the fact that the plan approximates theoretical population equality. Nor was the issue disposed of by *Marshall v. Hare, supra,* which never held invalid the state standards requiring districts to be compact, contiguous and regular in shape, and to follow county and political subdivision boundaries.[11]

Appellees argue that the Michigan court did utilize, and made the finding that the Austin-Kleiner plan complied with, the state standards "as nearly as practicable" subject to the "controlling objective of substantially equal population." (373 Mich. 250, 254, 128 N.W. 2d 722, 723) But the

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[10] 377 Mich. at 445-446, 453, 473, 140 N.W. 2d at 454-455, 458, 468. See also 376 Mich. at 477-479, 137 N.W. 2d at 524-525.

[11] Intervenors-appellees assert that *Marshall v. Hare* "necessarily invalidated much of what appellants would enforce," but do not explain what the "much" is which *Marshall* supposedly invalidated. The claim that *Marshall* is "*res judicata* thereof" is answered *supra.*

Michigan court's determination of the surviving state standards, and of the compliance of the Austin-Kleiner plan thereto, was predicated upon its erroneous conclusion that this Court's decision in *Reynolds v. Sims, supra,*[12] required districts "containing population as equal as the 1960 Federal decennial census permits." (373 Mich. at 254, 128 N.W. 2d at 723)

CONCLUSION

This Court has not expressly dealt with the question whether single member legislative districts, deliberately gerrymandered for partisan political purposes, constitute a violation of the Fourteenth Amendment. Nor has this Court had occasion to deal with the claim that valid state legislative districting standards need not be overridden in the quest for absolute equality of population under the Fourteenth Amendment. These are substantial Federal questions that are squarely presented by this case, and are, we submit, deserving of plenary consideration by this Court.

Respectfully submitted,

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[12] This Court held that the Equal Protection Clause requires districts "as nearly of equal population as is practicable." (377 U.S. 533, 577)

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